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GENISYS INTEGRATED ENGINEERS PTE LTD v. UEM GENISYS SDN BHD (IN LIQUIDATION) & ORS

FEDERAL COURT, PUTRAJAYA
VERNON ONG LAM KIAT FCJ
HASNAH MOHAMMED HASHIM FCJ
MARY LIM FCJ
[CIVIL APPEAL NO: 02(f)-45-05-2022(W)]
4 APRIL 2023

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Abstract – *The liquidator, pursuant to r. 92 of the Companies (Winding-Up) 1972 ('Rules'), must examine every proof of debt lodged with him and thereafter, decide whether to admit or reject the POD and if it is rejected, the grounds for such rejection must be stated in writing to the creditor. Deduction of certain amount is not rejection of the POD. Hence, the act of the liquidators admitting the POD, subject to certain deductions, amounted to acknowledgment that if the Limitation Act 1953 applies, that amounts to a fresh accrual of action, and the action is therefore not time-barred. The liquidator also must, at all times, act within the terms of contract and ought not to impose any terms outside the purview of contract; thus ought not to unilaterally impose interest at a rate unilaterally decided, beyond the contractual terms.*

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COMPANY LAW: *Winding-up – Liquidators – Duties and powers of liquidators – Proof of debt ('POD') – Limitation – Whether decision to accept or reject POD communicated – Whether Limitation Act 1953 applies to POD that was accepted but not formally rejected by liquidators – Liquidators admitted POD subject to deductions – Whether amounted to admission of sum claimed – Whether deductions equalled to rejection – Failure to issue formal notice of rejection – Whether company in liquidation denied opportunity to appeal – Whether unilateral imposition of interest outside scope of contract unlawful*

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LIMITATION: *Cause of action – Accrual of – Proof of debt ('POD') – Limitation – Whether liquidator communicated decision to accept or reject POD – Whether Limitation Act 1953 applies to POD that was accepted but not formally rejected by liquidators – Liquidators admitted POD subject to deductions – Whether amounted to admission of sum claimed – Whether amounted to fresh accrual of action – Whether claim time-barred*

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WORDS & PHRASES: *'action' – Section 2 of Limitation Act 1953 – Whether includes suit or any other proceedings in court of law – Proof of debt – Whether liquidators act in quasi-judicial capacity – Whether exercise of settling proofs of debts by liquidators amounts to exercise 'in court of law'*

I

By a shareholders' agreement, UEM Group Berhad and Genisys Integrated Engineers Pte Ltd ('GIE') agreed to form UEM Genisys Sdn Bhd ('UEG'). By an agreement dated 24 May 1996, an unincorporated joint venture, known as Gammon-Road Builder Joint Venture ('GRBJV'), appointed UEG to undertake works to supply and install mechanical and electrical works ('M&E contract'), which UEG subcontracted to GIE. GRBJV subsequently novated all its rights and obligations under the main contract and under the M&E contract to Gammon-CC1 Construction Co Ltd ('Gammon-CC1'). However, on 13 April 1998, Gammon-CC1 ceased all their works on the project and instructed their sub-contractors, including UEG, to cease works. A certificate of payment was issued by the architect, certifying, *inter alia*, the final M&E contract sum and the final payment due and payable by the main contractor to UEG. However, Gammon-CC1 failed to make payment pursuant to the certificate of payment. Hence, UEG commenced an action against Gammon pursuant to the guarantee to claim for the sum of USD995,879.39, the outstanding M&E contract sum ('Suit 1556'). When UEG was subsequently wound up, the second and third respondents ('liquidators') were appointed as UEG's liquidators. GIE lodged a proof of debt ('POD') dated 28 March 2011 with the liquidators to claim the sum of USD997,750.70 which included the outstanding sum of USD995,879.39. At a creditors' meeting on 30 March 2012 with GIE, the liquidators notified the creditors that they were contemplating withdrawing Suit 1556 as the entitlement was only 3% of the procurement fees and that the claim may be barred by statutory limitations. However, pursuant to a consent judgment between UEG and Gammon in Suit 1556, Gammon paid UEG the full sum as stipulated in the consent judgment together with interest for delay in the payment. Four years after the POD was filed by GIE, and shortly after the consent judgment was entered, the liquidators informed GIE that its claim for USD997,750.70 in the POD had been admitted to the extent of USD179,075.81 after deducting USD445,660.90, being the sum of 3% procurement fee, pursuant to cl. 10(B) of the sub-contract and interest of USD371,142.66 and a notice of dividend was issued for the sum of USD179,075.81 as the sum payable to GIE. GIE, *vide* a letter dated 24 November 2015, accepted the amount payable as specified in the notice of dividend under protest and without prejudice to its rights, *inter alia*, on the basis that the liquidators were not entitled to charge interest on the procurement fee. The High Court Judge allowed GIE's claim and found that GIE was entitled to the sum as claimed in the POD. The High Court found that GIE's entitlement was not time-barred as it was not based on the architect's certificate of payment but on the consent judgment. On appeal, the Court of Appeal allowed the respondents' appeal. Leave to appeal was granted on the following questions of law, *inter alia*: (i) whether the Limitation Act 1953 ('LA') applies to POD which is accepted and not formally rejected by a liquidator; and (ii) can the liquidators unilaterally

impose interest on the basis of a commercial decision and at a rate unilaterally decided by them despite the absence of any contractual provision and/or agreement by the appellant.

Held (allowing appeal with costs; setting aside decision of Court of Appeal)

Per Hasnah Mohammed Hashim FCJ delivering the judgment of the court:

(1) The creditors of the wound-up company are required by law to lodge a POD, a mandatory statutory process, together with supporting documents, to prove that the company in liquidation owes the creditor the sum as specified in the POD. The duty of the liquidator in making a decision and the right of a party to seek a court order to reverse or vary any decision of the liquidator is governed by r. 92 of the Companies (Winding-up) Rules 1972 ('Rules'). The liquidator must meticulously examine the POD lodged by the creditor together with supporting documents and thereafter, decide whether to accept or reject the POD. If he decides to reject, he is legally required, under the Rules, to state, in writing, to the creditor whose claim he has rejected, the grounds for the rejection. (paras 23, 25 & 26)

(2) Under the Rules, appeals must be made within 21 days from the date of service of the notice of rejection. The respondents, as the liquidators of UEG did not comply with the procedures provided under the Rules and instead, took steps outside the purview of the law. The liquidators notified GIE that they had admitted the POD to the extent of USD179,075.81 but subject to certain deductions, and issued the notice of dividend. The sum of RM916,803.57 was not rejected but deducted. If the intention of the liquidators was to reject the said sum as claimed in the POD, then they must specifically state so in the form. The liquidators failed to issue the notice of rejection in the prescribed form and, consequently, UEG was denied the opportunity of applying to the court to reverse or vary the decision of the liquidator. (paras 27, 32 & 33)

(3) The liquidators, having admitted the POD, resiled from their position and relied on s. 6(1) of the LA, rejecting the POD on the basis that GIE's cause of action expired on 20 November 2006 and was thus time-barred. If the claim under the POD was time-barred, it should have been rejected by the liquidators when the POD was filed in 2011 as the liquidators would have in their possession the relevant contract documents. It was only after the consent judgment was entered that the liquidators decided to notify GIE that the POD was admitted in full but subject to certain deductions. There was no mention of the claim being time-barred. (paras 36 & 37)

(4) The deduction of USD445,660.90 as the procurement fee was consequent to the consent judgment. GIE's claim was based on the consent judgment. UEG was only entitled to a 3% procurement fee and the balance would be that of GIE. The very act of deduction from the sum claimed by GIE was a tacit admission of the sum claimed for, otherwise, there could be not deduction, to begin with. Such admission amounted to an acknowledgment that, if the LA applies, s. 29 provides for a fresh accrual of action, in which case, the claim was not time-barred. (paras 41 & 42)

(5) Under s. 2 of the LA, 'action' includes a suit or any other proceedings in a court of law, *ie*, it only applies to matters in court of law. While liquidators may act in *quasi*-judicial capacities, the whole exercise of settling proofs of debts by liquidators is not an exercise 'in court of law'. Since the object of proving debts is to determine the genuineness of the debt, the argument of limitation by the respondents was not maintainable. In this appeal, the POD had been admitted and the claims had not been formally rejected by the liquidators. Accordingly, the first question of law was answered in the negative, that is, the LA does not apply to a POD that was accepted and not formally rejected by a liquidator. (paras 43, 44 & 46)

(6) The role of the liquidator is to ensure all debts had been paid. To bring an ailing company under its management, if possible, back on its feet within the confines of the law and supporting documents justifying the debts. The imposition of the late payment interest for over 20 years was outside the scope of the terms of the sub-contract, was not only incredulous but clearly unlawful. The POD exercise does not permit liquidators to assert a claim for the wound-up company without filing a civil claim in court. The liquidators were not asserting a right of set-off or mutual credit. The second question of law was answered in the negative. (paras 52 & 53)

Bahasa Melayu *Headnotes*

Melalui satu perjanjian pemegang-pemegang saham, UEM Group Berhad dan Genisys Integrated Engineers Pte Ltd ('GIE') bersetuju untuk membentuk UEM Genisys Sdn Bhd ('UEG'). Melalui perjanjian bertarikh 24 Mei 1996, satu usaha sama tidak diperbadankan, dikenali sebagai Gammon-Road Builder Joint Venture ('GRBJV'), melantik UEG untuk menjalankan kerja-kerja untuk pembekalan dan pemasangan kerja-kerja mekanik dan elektrik ('kontrak M&E'), yang disubkontrak oleh UEG kepada GIE. GRBJV kemudian telah novasi kesemua hak dan tanggungjawabnya bawah kontrak utama dan kontrak M&E kepada Gammon-CC1 Construction Co Ltd ('Gammon-CC1'). Walau bagaimanapun, pada 13 April 1998, Gammon-

A CC1 menghentikan kesemua kerja mereka berkaitan projek itu dan mengarahkan sub-kontraktor mereka, termasuk UEG, untuk menghentikan kerja-kerja. Satu sijil bayaran dikeluarkan oleh arkitek, mengesahkan, antara lain, jumlah kontrak M&E terakhir dan bayaran terakhir yang tertunggak dan perlu dibayar oleh kontraktor utama kepada UEG. Walau bagaimanapun, B Gammon-CC1 gagal membuat bayaran menurut sijil bayaran tersebut. Oleh itu, UEG memulakan tindakan terhadap Gammon menurut jaminan untuk menuntut sejumlah USD995,879.39, jumlah kontrak M&E yang tertunggak ('Guaman 1556'). Apabila UEG kemudiannya digulungkan, responden kedua dan ketiga ('pelikuidasi') dilantik sebagai pelikuidasi UEG. GIE C memasukkan bukti hutang ('POD') bertarikh 28 Mac 2011 dengan pelikuidasi untuk menuntut jumlah USD997,750.70 yang termasuk jumlah USD995,879.39. Dalam mesyuarat pemiutang-pemiutang pada 30 Mac 2012 dengan GIE, pelikuidasi memaklumkan pemiutang-pemiutang bahawa mereka berhasrat menarik balik Guaman 1556 kerana hanya berhak 3% fi pemerolehan dan tuntutan tersebut mungkin terbatas oleh had masa statutori. D Walau bagaimanapun, menurut perjanjian persetujuan antara UEG dan Gammon dalam Guaman 1556, Gammon membayar UEG jumlah penuh seperti yang dinyatakan dalam perjanjian persetujuan bersama-sama dengan faedah bayaran lewat. Empat tahun selepas POD difailkan oleh GIE dan tidak lama selepas perjanjian persetujuan dimasuki, pelikuidasi E memaklumkan pada GIE bahawa tuntutannya untuk USD997,750.70 dalam POD telah diterima masuk setakat USD179,075.81 selepas menolak sejumlah USD445,660.90, iaitu 3% fi pemerolehan, menurut cl. 10(B) sub-kontrak dan faedah sejumlah USD371,142.66 dan notis dividen dikeluarkan untuk jumlah USD179,075.81 sebagai jumlah yang perlu dibayar kepada F GIE. GIE, melalui surat bertarikh 24 November 2015, menerima jumlah yang perlu dibayar seperti yang dinyatakan dalam notis dividen bawah protes dan tanpa perjudis terhadap haknya, antara lain, atas dasar bahawa pelikuidasi tidak berhak mengenakan faedah atas fi pemerolehan. Hakim Mahkamah Tinggi membenarkan tuntutan GIE dan mendapati GIE berhak G terhadap jumlah yang dituntut dalam POD. Mahkamah Tinggi mendapati bahawa hak GIE tidak terbatas oleh had masa kerana itu tidak berasaskan pada sijil bayaran arkitek, sebaliknya, atas perjanjian persetujuan. Atas rayuan, Mahkamah Rayuan membenarkan rayuan responden-responden. Kebenaran merayu diberikan atas soalan-soalan undang-undang, antara lain: (i) sama ada Akta Had Masa 1953 ('Akta') diguna pakai pada POD yang H diterima dan tidak ditolak secara rasmi oleh pelikuidasi; dan (ii) sama ada pelikuidasi boleh, secara sebelah pihak, mengenakan faedah atas dasar keputusan komersial dan pada kadar yang ditentukan secara sebelah pihak oleh mereka walaupun tiada peruntukan kontrak dan/atau perjanjian oleh perayu.

I

Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Rayuan)
Oleh Hasnah Mohammed Hashim HMP menyampaikan penghakiman mahkamah:

(1) Pemiutang-pemiutang syarikat yang telah digulungkan diperlukan bawah undang-undang untuk memasukkan POD, satu proses statutori mandatori, bersama-sama dengan dokumen-dokumen sokongan, untuk membuktikan bahawa syarikat dalam pembubaran berhutang dengan pemiutang jumlah yang dinyatakan dalam POD. Tugas pelikuidasi apabila membuat keputusan dan hak pihak yang memohon perintah mahkamah untuk mengakas atau mengubah apa-apa keputusan pelikuidasi termaktub dalam k. 92 Kaedah-kaedah (Penggulungan) Syarikat 1972 ('Kaedah-kaedah'). Pelikuidasi perlu memeriksa dengan teliti POD yang dimasukkan oleh pemiutang bersama-sama dengan dokumen-dokumen sokongan dan kemudian, memutuskan sama ada hendak menerima atau menolak POD tersebut. Jika dia memutuskan untuk menolak, dia perlu, dari segi undang-undang, bawah Kaedah-kaedah, menyatakan secara bertulis kepada pemiutang yang tuntutannya ditolak, alasan-alasan penolakan tersebut.

(2) Bawah Kaedah-kaedah, rayuan perlu dibuat 21 hari dari tarikh penyerahan notis penolakan. Responden-responden, sebagai pelikuidasi UEG, tidak mematuhi prosedur yang diperuntukkan bawah Kaedah-kaedah dan sebaliknya, mengambil langkah-langkah di luar peruntukan undang-undang. Pelikuidasi memaklumkan GIE bahawa mereka telah menerima masuk POD setakat USD179,075.81 tetapi tertakluk pada pemotongan tertentu, dan mengeluarkan notis dividen. Jumlah RM916,803.57 bukan ditolak, sebaliknya, dipotong. Jika niat pelikuidasi adalah untuk menolak jumlah seperti yang dituntut dalam POD, mereka sewajarnya menyatakan itu secara spesifik dalam borang. Pelikuidasi gagal mengeluarkan notis penolakan dalam borang yang diperuntukkan dan akibatnya, UEG dinafikan peluang memohon ke mahkamah untuk mengakas atau mengubah keputusan pelikuidasi.

(3) Pelikuidasi, setelah menerima masuk POD, berbalik daripada kedudukan mereka dan bersandar pada s. 6(1) Akta, menolak POD atas dasar bahawa kausa tindakan GIE luput pada 20 November 2006 dan oleh itu, terhad masa. Jika tuntutan bawah POD terhad oleh masa, itu sepatutnya ditolak oleh pelikuidasi semasa POD difailkan pada 2011 kerana pelikuidasi mempunyai dokumen-dokumen kontrak yang relevan dalam milikan mereka. Hanya selepas penghakiman persetujuan dimasuki, pelikuidasi memutuskan untuk memaklumkan GIE bahawa POD tersebut diterima masuk secara penuh tetapi tertakluk pada pemotongan tertentu. Tidak dinyatakan tentang tuntutan itu terhad oleh masa.

(4) Pemotongan USD445,660.90 sebagai fi pemerolehan adalah akibat penghakiman persetujuan. Tuntutan GIE adalah berasaskan penghakiman persetujuan. UEG hanya berhak pada 3% fi pemerolehan dan bakinya milik GIE. Tindakan pemotongan daripada jumlah yang dituntut GIE adalah pengakuan secara tersirat terhadap jumlah dituntut, kerana, jika tidak, tiada pemotongan boleh dibuat. Pengakuan sedemikian membentuk pengakuan bahawa, jika Akta terpakai, s. 29 memperuntukkan tindakan baharu terakru, dan oleh itu, tuntutan tersebut tidak terbatas oleh had masa.

(5) Bawah s. 2 Akta, 'tindakan' termasuk guaman atau apa-apa prosiding lain dalam mahkamah undang-undang, iaitu, itu hanya terpakai pada perkara-perkara di mahkamah undang-undang. Walaupun pelikuidasi boleh bertindak dalam kapasiti separa-kehakiman, keseluruhan pelaksanaan menyelesaikan pembuktian hutang oleh pelikuidasi bukan satu pelaksanaan 'dalam mahkamah undang-undang'. Oleh sebab tujuan pembuktian hutang adalah untuk menentukan kesahan hutang, hujahan had masa oleh responden-responden tidak boleh dikekalkan. Dalam rayuan ini, POD telah diterima masuk dan tuntutan-tuntutan tersebut tidak ditolak secara rasmi oleh pelikuidasi. Oleh itu, soalan undang-undang pertama dijawab secara negatif, iaitu, Akta tidak terpakai pada POD yang diterima dan tidak ditolak secara rasmi oleh pelikudasi.

(6) Peranan pelikuidasi adalah untuk memastikan kesemua hutang dibayar. Menjadikan syarikat yang tenat bangkit semula, jika boleh, dalam ruang lingkup undang-undang dan dokumen-dokumen sokongan untuk menjustifikasi hutang-hutangnya. Pengenaan faedah bayaran lewat untuk lebih 20 tahun adalah di luar skop terma-terma sub-kontrak, bukan sahaja tidak boleh dipercayai tetapi jelas tidak sah. Pelaksanaan POD tidak membenarkan pelikuidasi membuat tuntutan untuk syarikat yang digulungkan tanpa memfailkan tuntutan sivil di mahkamah. Pelikuidasi-pelikuidasi tidak membuat tuntutan hak untuk menolak selesai atau kredit bersama. Soalan undang-undang kedua dijawab secara negatif.

Case(s) referred to:

Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor [2007] 2 CLJ 405 CA ***(refd)***

Buchler And Another (As Joint Liquidators Of Leyland DAF Limited) v. Talbot [2004] UKHL 9 ***(refd)***

Feima International (Hong Kong) Ltd (In Liquidation) v. Kyen Resources Pte Ltd [2022] SGHC 304 ***(refd)***

Lim Siew Soo v. Sembawang Engineers And Constructors Pte Ltd (In compulsory liquidation) And Metax Eco Solutions Pte Ltd, Intervener [2021] SGHC 32 ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Tanning Research Laboratories Inc v. O'Brien [1990] 91 ALR 180 ***(refd)***

Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation) [2020] 4 CLJ 841 FC ***(refd)***

The Joint Administrators of LB Holdings Intermediate 2 Limited (Appellant) v. The Joint Administrators Of Lehman Brothers International (Europe) And Others (Respondents) The Joint Administrators Of Lehman Brothers Limited (Appellant) v. Lehman Brothers International (Europe) (In Administration) And Others (respondents) Lehman Brothers Holdings Inc (Appellant) v. The Joint Administrators Of Lehman Brothers International (Europe) And Others (Respondents) [2017] UKSC 38 ***(refd)***
Torita Rubber Works Sdn Bhd v. Chew Chong Eu [2009] 9 CLJ 280 HC ***(refd)***
Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2013] 3 CLJ 17 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 487(3)
Companies (Winding-up) Rules 1972, rr. 78, 81, 91, 92, 93, 97
Limitation Act 1953, ss. 2, 6(1)(a), 29

For the appellant - Gideon Tan, Brian Ernest Cumming & Ashvinpal Kaur; M/s Gideon Tan Razali Zaini
For the respondents - T Baskaran, Roveena Tara & Hanisah Mohd Rusli; M/s Baskaran

[Editor's note: For the Court of Appeal judgment, please see UEM Genisys Sdn Bhd & Ors v. Genisys Integrated Engineers Pte Ltd [2022] 1 LNS 3 (overruled); Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCC-502-12-2017 (affirmed).]

Reported by S Barathi

JUDGMENT

Hasnah Mohammed Hashim FCJ:

[1] The appeal raised questions of some significance relating to the duties and powers of a liquidator in respect of proof of debts lodged by creditors.

[2] On 26 April 2022, this court granted the appellant leave to appeal in respect to the following questions of law:

> Question 1
>
> Can the Limitation Act 1953 apply to proof of debt which is accepted and not formally rejected by a liquidator?
>
> Question 2
>
> Can the liquidators unilaterally impose interest on the basis of a commercial decision and at a rate unilaterally decided by them despite the absence of any contractual provision and/or agreement by the appellant?

The Factual Background

[3] The facts are not complicated and mainly, undisputed. However, it is necessary to set out the material facts to appreciate the issues argued in this appeal. By a shareholders' agreement dated 2 November 1993, UEM Group Berhad formerly known as United Engineers (Malaysia) Berhad (UEM) and Genisys Integrated Engineers Pte Ltd (GIE) agreed to form UEM Genisys Sdn Bhd (UEG). UEM and GIE as shareholders held 51% and 49% of its shareholding respectively. GIE is also a contributory and creditor of UEG.

[4] Gammon Construction Limited (Gammon) and Road Builder (M) Sdn Bhd, established an unincorporated joint venture known as Gammon-Road Builder Joint Venture (GRBJV). GRBJV entered into an agreement with Vietnam-Malaysia Joint Venture Company Limited (Vimas) to perform works, described as the construction, completion and maintenance of an international class hotel in Hanoi, Vietnam (main contract). By an agreement dated 24 May 1996, GRBJV appointed UEG to undertake works under the main contract, in particular, to supply and install mechanical and electrical works (the M&E contract). UEG subcontracted the works under the M&E contract to GIE (subcontract).

[5] In December 1996, GRBJV with the consent of Vimas, novated all its rights and obligations under the main contract to Gammon-CC1 Construction Co Ltd (Gammon-CC1). Subsequently by a written agreement dated 20 August 1997, GRBJV with the consent of UEG, novated all its rights and obligations under the M&E contract to Gammon-CC1. Pursuant to a guarantee also dated 20 August 1997, Gammon guaranteed Gammon-CC1's performance in respect of the M&E contract (guarantee).

[6] On 13 April 1998, by an agreement between Vimas and Gammon-CC1, Gammon-CC1 ceased all their works on the Hanoi Sheraton Hotel Project and instructed their sub-contractors, including UEG, to cease works. GDP Architects Sdn Bhd issued a certificate of payment dated 6 November 2000 (the certificate of payment) certifying, *inter alia*, the final M&E contract sum and the final payment due and payable by the main contractor to UEG.

[7] However, Gammon-CC1 failed to make payment pursuant to the certificate of payment. UEG then commenced an action against Gammon pursuant to the guarantee to claim for the outstanding sum of USD995,879.39 which is the outstanding M&E contract sum *vide* Kuala Lumpur High Court Suit No D2-22-1556-2006 (Suit 1556).

[8] UEG was subsequently wound up on 20 October 2005. The second and third respondents (collectively referred to as liquidators) were appointed as UEG's liquidators.

[9] GIE lodged a proof of debt (POD) dated 28 March 2011 with the liquidators to claim the sum of USD997,750.70 which includes the outstanding sum of USD995,879.39. The POD sets out the claims as follows:

(i) RM3,065,11.99

(ii) GBP4,533.63

(iii) SGD345,487.87

(iv) USD997,750.70

[10] At a creditors meeting held on 30 March 2012 with GIE, the liquidators notified the creditors that they were contemplating withdrawing Suit 1556 as the entitlement is only 3% of the procurement fees and that the claim may be barred by statutory limitations. However, on 5 August 2015, UEG and Gammon entered into a consent judgment in Suit 1556 where it was agreed that a total sum of USD1,215,000 ("the consent judgment sum") will be paid by Gammon to UEG on or before 19 August 2015. Gammon paid UEG the full sum as stipulated in the consent judgment on 23 August 2015 together with interest of USD832.19 for delay in the payment. Four years after the POD was filed by GIE and shortly after the consent judgment was entered, the liquidators informed GIE that its claim for USD997,750.70 in the POD had been admitted to the extent of USD179,075.81 after deducting the procurement fee of USD445,660.90 (being the sum of 3% procurement fee) pursuant to cl. 10(B) of the subcontract and interest of USD371,142.66 and a notice of dividend was issued for the sum of USD179,075.81 as the sum payable to GIE.

[11] GIE *vide* a letter dated 24 November 2015 accepted the amount payable as specified in the notice of dividend under protest and without prejudice to its rights, *inter alia*, on the basis that the liquidators were not entitled to charge interest on the procurement fee. GIE argued that the amount due and owing by UEG is USD995,879.38 and that under the subcontract the liquidators are not entitled to impose any interest for the procurement fee as the subcontract itself does not have any provision for the imposition of interest. However, without giving any reasons whatsoever the liquidators maintained their position and paid USD179,075.81 to GIE on 11 December 2015.

[12] The learned High Court Judge allowed GIE's claim and found that GIE is entitled to the sum as claimed in the POD. GIE's claim was premised on the failure of UEG to fulfil its contractual obligations to pay the consent judgment sum and the additional interest pursuant to the subcontract. The consent judgment sum and the additional interest being rights and benefits arising from the contract. The High Court thus ordered UEG to pay GIE the sum of USD1,006,880 as special damages with interest.

[13] The High Court found that GIE's entitlement was not time-barred as it was not based on the architect's certificate of payment dated 6 November 2000 but on the consent judgment entered. The liquidators ought to have taken the first step of notifying GIE of the rejection of POD by issuing the notice of rejection in Form 59. As that was not issued, r. 93 of the Companies (Winding-up) Rules 1972 (WUPR) on appeal by the creditor was not available to assist GIE. It was only on 2 November 2015 that a formal reply was given. The issue in any case had been ventilated at GIE's leave application at the winding up court and was thus *res judicata*.

[14] The liquidators were held to be personally liable for the costs of proceedings on an indemnity basis as their conduct had unnecessarily caused GIE to commence their action. Their unreasonable and vexatious conduct was demonstrated by the deduction of the procurement fee despite knowing it was time-barred. When they were informed of the disagreement, they ought to have sought the court's direction pursuant to s. 487(3) of the Companies Act 1965 (CA) (then applicable). This was not done.

[15] On appeal, the Court of Appeal disagreed with the High Court and allowed the respondents' appeal. The Court of Appeal was of the view that limitation did not apply. UEG's deduction of USD445,660.90 for the procurement fee was proper and valid as the liquidators had deducted the procurement fee from the sum received. The liquidators recovered the said sum when UEG sued the guarantor. It would have been inequitable for GIE to rely on limitation. On the other hand, GIE's claim in the POD is based on an architect's certificate dated 6 November 2000 and it was time-barred. The liquidators had also not acted *mala fide* or unreasonably.

[16] The Court of Appeal opined that the imposition of interest was a commercial decision and therefore justified.

The Legal Framework

[17] The Companies (Winding-Up) Rules 1972 (WUPR) governs the pre and post-winding-up procedures. Rule 78 of the WUPR provides that every creditor shall prove his debt. In certain cases, the judge may give directions that debts be admitted without proof. The mode of proof as prescribed under the WUPR is by submitting to the liquidator, an affidavit verifying the debt. Rule 81 of the WUPR provides that an affidavit proving a debt may be in the form prescribed and shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The liquidator may at any time call for the production of the vouchers or any supporting documents.

[18] Rule 92 of the WUPR states that the liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds for the rejection.

Whether The Limitation Act 1953 Applies To Proof Of Debt That Is Accepted And Not Formally Rejected By A Liquidator?

[19] The argument on limitation arises in two respects. First, with regard to GIE's claim; second, in respect of UEG's deductions for the procurement fee. Both parties argued that the Limitation Act 1953 (the Limitation Act) does not apply; but for different reasons. Counsel for GIE argues that GIE's claim is not time-barred because its claim is premised on the consent

judgment while UEG argues that the Limitation Act does not apply to the deductions because the deductions are conducted outside the aegis of the court, under the insolvency regime. In response to both arguments, the parties respectively argue that the claim is time-barred; UEG contending that GIE's claims arose from the architect's certificate; while GIE contending that UEG was not entitled to impose late interest charge on the payment of the procurement fee.

[20] More specifically, GIE contends that the consent judgment entered with Gammon is for works done under the subcontract. Based on the terms of the subcontract, UEG is obligated to pay the said sum to GIE. UEG is only entitled to the sum of USD29,876.38, which is the 3% procurement fee on the outstanding sum. Hence, the claim is not statutorily barred as it is not based on the architect's certificate of payment dated 6 November 2000 but based on the consent judgment dated 5 August 2015. This is specifically pleaded by GIE in its statement of claim. Furthermore, the POD was never formally rejected by the liquidators.

[21] The liquidators assert that they are entitled to deduct the procurement fee of USD445,660.90. The deduction was to recover the procurement fee without involving the courts. The liquidators further argued that the claim by GIE on 14 December 2017 was time-barred by virtue of s. 6(1)(a) of the Limitation Act as any payment under the architect certificate would have set in on 20 November 2006 as the cause of action accrued on 20 November 2000. Furthermore, it was argued that limitation does not arise in POD.

[22] The duty of a liquidator is primarily to manage the assets of the wound up company, investigate the affairs of the company, gather and realise the assets of the company, if necessary sell off the company's assets, distribute the proceeds, if any, and settle outstanding debts of the ailing company under his administration.

[23] The creditors of the wound up company are required by law to lodge a POD together with supporting documents to prove that the company in liquidation owes the creditor the sum as specified in the POD. Lodging a POD is a mandatory statutory process for a creditor of a wound up company. A POD is essentially a documentary declaration made by the creditor, towards establishing or proving the debt that the company owes to its creditors. The POD must be lodged by a creditor with the appointed liquidator and it details the debt owed by the wound up company together with supporting documents substantiating the debts so claimed.

[24] The objective of this exercise is to ensure that the assets of the wound up company are distributed fairly and justly amongst all creditors so that none of them will gain an advantage over the others. The Supreme Court in *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47 explained that

A "... the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts." In other words, the creditor must satisfy the liquidator that the debt is provable and genuine. This is sometimes referred to as 'true liabilities' (see *Tanning Research Laboratories INC v. O'Brien* [1990] 91 ALR
B 180).

[25] The procedures to claim any debt from the wound up company is well structured under the WUPR. The duty of the liquidator in making a decision and the right of a party to seek a court order to reverse or vary any decision of the liquidator is governed by r. 92 of the WUPR. It is mandatory under
C the aforesaid rules that the liquidator examine every proof of debt lodged with him, the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of the debt.

[26] The liquidator must meticulously examine the POD lodged by the creditor. After having examined the claim together with supporting
D documents, the liquidator must decide whether to accept or to reject the POD. If he decides to reject, he is legally required under the WUPR to state, in writing, to the creditor whose claim he has rejected, the grounds for the rejection. Under r. 92 of the WUPR, the liquidator is required to issue a notice of rejection as prescribed in Form 59:

E

No. 59

(Rule 92)

NOTICE OF REJECTION OF PROOF OF DEBT

F TAKE notice that, as (Official Receiver and) Liquidator of the above-named company, I have this day rejected your claim against the company (a) (to the extent of $ ...) on the following grounds:

And further take notice that subject to the power of the Court to extend the time, no application to reverse or vary my decision in rejecting your proof will be entertained after the expiration of (b) ... days from this date.

G

[27] The respondents as the liquidators of UEG did not comply with the procedures provided under the rules and instead took steps outside the purview of the law. The liquidators notified GIE they had admitted the POD to the extent of USD179,075.81 but subject to certain deductions, and issued the notice of dividend. The sum of RM916,803.57 was not rejected but
H deducted. If the intention of the liquidators was to reject the said sum as claimed in the POD then they must specifically state so in the form as prescribed under r. 92 of the WUPR.

[28] However, it was only through the liquidators' solicitors *vide* a letter
I dated 5 December 2017, that they notified GIE that the sum claimed in the POD is time-barred as the cause of action against UEG had set in on 20 November 2006. As a consequence, there is no sum owing to GIE by UEG.

[29] GIE argued that its claim is not based on the subcontract but based on the consent judgment entered between UEG and Gammon on 5 August 2015. This is clearly and specifically stated in the statement of claim. Thus, limitation cannot apply as the POD was admitted and not rejected by the liquidators.

[30] Rule 91 of the WUPR provides that subject to the provisions of the CA and unless otherwise ordered by the court, the liquidator in any winding up may from time to time fix a day (which shall be not less than 21 days from the date of the notice) on or before which the creditors of the company are to prove their debts or claims or otherwise be excluded from the benefit of any distribution specified. The liquidator shall give notice of the day so fixed by advertisement in the *Gazette* in the prescribed form and in such newspaper as well as a notice in writing in either Forms 57 or 58 to every person who to the knowledge of the liquidator claims to be a creditor of the company and whose claim has not been admitted or, in a winding up by the court, to every person mentioned in the statement of affairs as a creditor who has not proved his debt.

[31] Where a creditor is dissatisfied with the decision of the liquidator rejecting his proof, he may appeal to the court to reverse or vary that decision within 21 days from the date of service of the notice of rejection. That 21-day period may be extended, on application, by the court. The liquidator may in such a situation make provision for the dividend upon such proof, and the probable cost of the appeal in the event of the proof being admitted. In the event no notice of appeal has been given within the time specified in this rule, the liquidator shall exclude all those proofs which have been rejected from participation in the dividend.

[32] The court will not interfere with the decision of the liquidator unless the circumstances or the facts warrant it. (See *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* [2007] 2 CLJ 405; [2007] 2 MLJ 12; *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629; *Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation)* [2020] 4 CLJ 841; [2020] 6 MLJ 168). When the liquidators admit the POD, it is an acknowledgment of the debt. What had transpired in this appeal before us is that the liquidators failed to issue the notice of rejection in the prescribed Form 59 and as a consequence of the failure to issue the prescribed notice, UEG is denied the opportunity of applying to the court to reverse or vary the decision of the liquidator as no notice of rejection was ever issued. Rule 93 of the WUPR reads:

> If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary

A the decision of the liquidator in a winding-up by the Court shall be entertained, unless notice of the application is given before the expiration of twenty-one days **from the date of service of the notice of rejection**.

(emphasis added)

B **[33]** Under the WUPR, appeals must be made within 21 days from the date of service of the notice of rejection. The courts may extend the time but in the absence of any extension, a notice of application for the appeal must be submitted within 21 days. The liquidator then would have to file a memorandum of his disallowance of the POD within three days from the date he receives the notice of the creditors' appeals (See r. 97 of the WUPR).

C **[34]** The POD was filed on 28 March 2011. On 10 May 2012, the liquidators admitted a sum of RM755,059.89 and SGD250,373.48 referred to as the "additional admitted amount". Some other amounts had been admitted earlier whilst some others were rejected. However, in the same letter, the liquidators informed GIE that they had yet to decide on the claim D of USD995,879.55 and SGD20,230.44 pending further verification and review and that a decision was expected by the end of May 2012.

[35] It was four years later in November 2015 that the liquidators informed GIE in writing that the claim amount of USD997,750.70 had been admitted E to the extent of USD179,075.81. The liquidators rejected the claim of USD1,871.32. However, in respect of the balance of USD995,879.55, the said sum was not rejected but a sum of USD816,803.57 was deducted for the purpose of procurement fee due to UEG pursuant to cl. 10(B) of the subcontract.

F **[36]** It is quite clear in this appeal before us that the liquidators had obviously disregarded the procedures set out under the WUPR by failing to issue the mandatory statutorily required notices. Instead, after having admitted the POD, the liquidators resiled from their position and relied on s. 6(1) of Limitation Act, rejecting the POD on the basis that GIE's cause G of action expired on 20 November 2006 and was thus time-barred. If at all the claim under the POD was time-barred it should have been rejected by the liquidators when the POD was filed in 2011 as the liquidators would have in their possession the relevant contract documents.

[37] It was only after the consent judgment was entered that the liquidators H decided to notify GIE *via* a letter that the POD is admitted in full but subject to certain deductions. There was no mention of the claim being time-barred. The issue of limitation was raised after GIE filed the claim against the liquidators.

[38] Although the question for determination by this court is not directly I on the compliance of the procedures under the WUPR but whether limitation applies to the POD admitted, our observations in this regard must be

expressed. Limitation generally would apply to any cause of action filed after six years. If a POD has been accepted and has not rejected, then the liquidators cannot renege on a decision made as the liquidators of UEG and decide to rely on limitation two years later. If a liquidator rejects a POD based on limitation, he must state so in clear and in no uncertain terms in the notice of rejection. This was not done. It was clearly an afterthought by the liquidators.

[39] As the liquidators of UEG, the second and third respondents are obliged to perform their legal duties as provided under the statute. A liquidator's paramount duty is to administer diligently the affairs of the wound up company, to secure the assets of the company, and realise and distribute the surplus if any. He is required to act in a fair and honest manner and to be impartial and independent. At all times the liquidator must act in the interest of the wound up company, contributory, and the creditors and cannot profit from his office. The protocols in respect of accepting or rejecting POD are clearly provided under the WUPR. As liquidators, the respondents had flagrantly failed to comply with the procedures under the WUPR. The liquidators had admitted the POD of GIE. Having done so, the liquidators are estopped from availing themselves and invoking the statute of limitation to reject the said POD.

[40] The crux of GIE's claim is the failure of UEG to fulfil its contractual obligations. Under the terms of the subcontract between UEG and GIE, GIE has the same rights and benefits as UEG has against the main contractor under the M&E contract. It is also a term of the subcontract that UEG shall procure and ensure that the main contractor pays the M&E subcontract sum direct to GIE in accordance with the payment terms of the said M&E contract. GIE will, after the receipt pay UEG the procurement fees. The liquidators were well aware of the terms of the subcontract.

[41] The liquidators contended that they are entitled to deduct the sum of USD445,660.90 as the procurement fee is not caught by limitation as the deduction was made without the courts' involvement.

[42] We disagree. There was never any rejection of the sum claimed under the POD by the liquidators. The deduction by the liquidators is consequent to the consent judgment entered on 5 August 2015 in Suit 1556. GIE's claim is based on that consent judgment. UEG is only entitled to 3% procurement fee and the balance will be that of GIE. In our view, the very act of deduction from the sum claimed by GIE is a tacit admission of the sum claimed for otherwise there can be no deductions, to begin with. Such admission amounts to an acknowledgment that if the Limitation Act applies, and we will discuss this next, s. 29 Limitation Act provides for a fresh accrual of action in which case, the claim is not time-barred.

[43] On the question of whether the Limitation Act applies, the language of the Limitation Act clearly provides that it is an Act providing for limitation of actions and arbitrations. Under s. 2 of the Limitation Act, "action" includes a suit or any other proceeding in a court of law. That is to say, it only applies to matters in a court of law. While liquidators may act in *quasi*-judicial capacities (see Michael Murray & Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters) 10th edn, 2018), the whole exercise of settling proofs of debts by the liquidator is still not an exercise "in a court of law". Even the liquidators argued that the deductions were outside the courts' involvement.

[44] Since the object of proving debts is to determine the genuineness of the debt, the argument of limitation by the respondents is not maintainable. The same cannot be said for the deductions because the exercise is to deal with the claims against UEG and not claims by UEG against GIE or any other creditor. (See *Lim Siew Soo v. Sembawang Engineers And Constructors Pte Ltd (In compulsory liquidation) And Metax Eco Solutions Pte Ltd, Intervener* [2021] SGHC 32; *Feima International (Hong Kong) Ltd (In Liquidation) v. Kyen Resources Pte Ltd* [2022] SGHC 304; *Torita Rubber Works Sdn Bhd v. Chew Chong Eu* [2009] 9 CLJ 280; [2009] 5 MLJ 208).

[45] UEG must file in a court of law for its claim for the procurement fee. However, if at all, UEG is entitled, it is only for the 3% procurement fee.

[46] In this appeal before us the POD has been admitted and the claims have not been formally rejected by the liquidators. Accordingly, the first question of law is answered in the negative that is, the Limitation Act 1953 does not apply to a proof of debt that is accepted and not formally rejected by a liquidator.

Whether The Liquidators Can Unilaterally Impose Interest On The Basis Of A Commercial Decision And At A Rate Unilaterally Decided By Them Despite The Absence Of Any Contractual Provision And/Or Agreement By The Appellant?

[47] The primary concern of a liquidator is to liquidate the company's assets in the most cost-saving and expeditious manner. As liquidators, the respondents cannot exercise their discretion arbitrarily but must be based on just and equitable principles, the interest of the wound up company is paramount.

[48] A liquidator is the guardian of the assets of a wound up company. His duty is to ensure that if there are debts owing payments must be made once he is satisfied that the debts are provable debts and supported with evidentiary documents. The decision to admit a POD will be based on the documents before him. If the POD is based on a contract then he must meticulously examine the terms of the contract and decide based on the terms

of the contract. He cannot act outside the terms of the contract and impose terms outside the purview of the contract.

[49] Lord Hoffmann in *Buchler And Another (As Joint Liquidators Of Leyland DAF Limited) v. Talbot* [2004] UKHL 9 at p. 28 explained:

> The winding up of a company is a form of collective execution by all its creditors against all its available assets. The resolution or order for winding up divests the company of the beneficial interest in its assets. They become a fund which the company thereafter holds in trust to discharge its liabilities: *Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd* [1976] AC 167. It is a special kind of trust because neither the creditors nor anyone else have a proprietary beneficial interest in the fund. The creditors have only a right to have the assets administered by the liquidator in accordance with the provisions of the Insolvency Act 1986: see *In Re Calgary and Edmonton Land Co Ltd (In liquidation)* [1975] 1 WLR 355, 359 ...

[50] Lord Neuberger in *The Joint Administrators of LB Holdings Intermediate 2 Limited (Appellant) v. The Joint Administrators Of Lehman Brothers International (Europe) And Others (Respondents) The Joint Administrators Of Lehman Brothers Limited (Appellant) v. Lehman Brothers International (Europe) (In Administration) And Others (Respondents) Lehman Brothers Holdings Inc (Appellant) v. The Joint Administrators Of Lehman Brothers International (Europe) And Others (Respondents)* [2017] UKSC 38 explained:

> In my judgment, contrary to the conclusion reached by David Richards J, the contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for his debt and been paid out on his proof in a distributing administration. As already mentioned in *In Re Humber Ironworks* LR 4 Ch App 643, 647, Giffard LJ, having held that a creditor could only prove for contractual interest up to the liquidation date, explained that "[t]hat rule ... works with ... fairness", because "where the estate is solvent ..., as soon as it is ascertained that there is a surplus, the creditor ... is remitted to his rights under his contract". However, as I have also explained, that observation was made in the context of a decision which was wholly based on what Giffard LJ expressly described as "Judge-made law", because the contemporary statutory provisions gave no guidance as to how contractual interest was to be dealt with in a winding-up. The position is, of course, very different now, especially in relation to interest on proved debts in liquidations and administrations.

[51] The issue before the Supreme Court in *Lehman Brothers* is whether a creditor of LBIE who had been entitled to, but had not been paid, statutory interest, can claim such interest in a subsequent liquidation. The Supreme Court concluded that the contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for a debt and been paid on his proof in a distributing administration.

[52] The Court of Appeal in this appeal considered that the liquidators could arrive at a commercially sensible conclusion by the imposition of the interest as explained in their grounds of judgment. With the greatest of respect, we disagree. The approach taken by the Court of Appeal is clearly erroneous. The role of the liquidator is to ensure that all debts have been paid. To bring an ailing company under its management if possible, back on its feet within the confines of the law and supporting documents justifying the debts. The imposition of the late payment interest for over 20 years is outside the scope of the terms of the subcontract, is not only incredulous but clearly unlawful. This is in addition to our observations that the POD exercise does not permit liquidators to assert a claim for the wound up company without filing a civil claim in court. We note that the liquidators never/are not asserting a right of set-off or mutual credit; arguments which are popularly raised and dealt with by a court of law and not unilaterally by liquidators.

[53] The second question of law is answered in the negative.

Conclusion

[54] Having carefully considered the submissions of all parties and for all the reasons aforesaid we allow the appeal with costs of RM100,000 to be paid by the second and third respondents, jointly and severally, subject to allocator. We set aside the decision of the Court of Appeal and restore the decision of the High Court.

[55] My learned brother Vernon Ong Lam Kiat, FCJ and my learned sister Mary Lim Thiam Suan, FCJ have sight of the judgment in draft, concur with the reasons given and the conclusions reached.